IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-248

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HERBERT F. KORHOLZ, *Petitioner*

v.

MARY M. DASHO, *et al.*

AND

THE SUSQUEHANNA CORPORATION, *et al.*
*Respondents*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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## BRIEF FOR THE SUSQUEHANNA CORPORATION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals is reproduced at Pet. B1-B5. The opinion of the district court is reproduced at Pet. A1-A47.

### JURISDICTION

The judgment of the court of appeals was entered May 27, 1975 (Pet. B1), and the petition for a writ of certiorari was filed August 16, 1975. The juris-

iction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether the court of appeals properly affirmed the istrict court's judgment dismissing this ten-year-old hareholders' derivative action against nine of the welve individual defendants pursuant to a compre-ensive, fair and equitable stipulation of compromise nd settlement which allows the plaintiffs and the ominal corporate defendant, in connection with trial reparation, to obtain some informal discovery from he settling defendants and their counsel—discovery hat is expressly limited by the terms of the settle-nent agreement and the rulings of the courts below o non-privileged matters.

## RULE INVOLVED

Rule 23.1 of the Federal Rules of Civil Procedure s set forth at Pet. G1-G2.

## STATEMENT

The petition for certiorari seeks to set aside an micable judgment of dismissal entered in favor of ine of this action's twelve defendants, by invalidat-ng the underlying stipulation of settlement and com-promise. Petitioner is not a party to the stipulation, nd the case against him still is pending in the dis-rict court. The pertinent background facts, the terms f the compromise settlement, and the rulings of the ower courts are set forth below.

1. This action, *Dasho* v. *Susquehanna Corp.*, and ts companion, *Berman* v. *Thomson* (No. 65 C 2051),



were filed in the United States District Court for the Northern District of Illinois in 1965. Each is a shareholders' derivative suit on behalf of the nominal corporate defendant, The Susquehanna Corporation ("Susquehanna"), against, *inter alia,* its former officers and directors including petitioner Herbert F. Korholz, who was Susquehanna's chairman of the board and chief executive officer until 1972. Both actions charge the defendants with fraud. Summary judgment of liability has been entered against petitioner in *Berman* (Pet. A27-A28, reported at 312 F.Supp. 1031), and in *Dasho* the court of appeals has ruled that the evidence of record "would support a finding that Korholz had deceived other members of the board" (Pet. A16).

2. During the ten-year pendency of *Dasho,* certiorari has been sought and denied twice, the case has been before the Seventh Circuit three times, the district court has written six opinions, and an eight week trial has been held. Following the 1972 court of appeals decision remanding the action for a second trial, all parties attempted to reach a resolution by compromise settlement.

In 1974 the resulting stipulation of settlement and compromise among plaintiffs, Susquehanna, and nine individual defendants was approved as fair and equitable by Circuit Judge Tone (sitting by designation).[1]

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[1] The factual findings and legal analysis supporting the court's exercise of its discretion are set forth in a detailed, forty-page opinion (Pet. A1-A47). In the same opinion the court declined to approve a proposed settlement proferred by the three remaining defendants, including petitioner, finding it unfair and inequitable "in view of its failure to dispose of the important subject of attorneys fees" (Pet. A8).

During the hearing "all conceivable objections to the [approved] settlement were aggressively presented by the objectors, and the interests of all shareholders, whatever the viewpoints, were adequately represented" (Pet. A41). Petitioner presented his objections in two capacities: as a party-defendant and as a Susquehanna shareholder.

3. The approved stipulation of compromise and settlement fairly and equitably disposes of all disputes between the settling defendants on the one hand, and plaintiffs and Susquehanna on the other, and petitioner does not contend otherwise. The stipulation provides for substantial monetary payments to Susquehanna, for releases and assignments of claims, for covenants not to sue and to defend and indemnify, and litigation costs are allocated among its parties (Pet. D1-D20). The stipulation also states (in paragraph five) that the settling defendants will furnish plaintiffs and Susquehanna with some informal "trial preparation" discovery (¶5(a) ) and will be trial witnesses if called in *Dasho* or in *Berman* (¶5(e) ). Related provisions apply to counsel for the settling defendants (¶¶5(b), (c), (d) ).

Privileged materials are excluded from the stipulation's discovery provisions; the lawyer-client privilege is preserved inviolate; and no duty or obligation is to be owed to plaintiffs or to Susquehanna as a result of the discovery. These ethical safeguards are spelled out in subparagraph 5(g), which reads as follows in relevant part—

> nothing contained in subparagaphs a, b, c, d, or e of this paragraph 5 shall require or expect any counsel for the Settling Defendants (*i*) to breach



> or to permit his client to breach an attorney client obligation which he may have to any Remaining Defendant; (*ii*) to divulge information or to produce a document which contains the work product of any attorney presently representing a Remaining Defendant or which represents the joint work product or work effort of defense counsel involved in the first trial of this action or in preparation for the second trial of this action upon remand, or (*iii*) to owe any duty or obligation to Plaintiffs or Susquehanna which are incident to attorney client obligations.

4. The counsel involved are the Washington, D.C., firm of Rhyne & Rhyne, and the Chicago, Illinois, firm of Schiff, Hardin & Waite. They represent different groups of settling defendants at this time. At earlier stages of the litigation Rhyne & Rhyne had also represented both Susquehanna and petitioner (Pet. 11), and Schiff, Hardin & Waite had cooperated in trial preparation with Rhyne & Rhyne (Pet. 12-13). Petitioner and Susquehanna have had separate counsel in this action only since 1972.[2]

5. The district court, addressing itself to petitioner's challenge to paragraph five of the stipulation, ruled that the agreement of the settling parties could not and did not adversely affect petitioner's rights (Pet. A42). First, Judge Tone expressly found that the stipulation's discovery provisions do not ap-

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[2] Rhyne & Rhyne's representation of petitioner was coterminous with its representation of Susquehanna. That joint representation began in 1969, continued for as long as petitioner had power to select Susquehanna's counsel as well as his own, and ended in 1972 when petitioner and Susquehanna parted ways. Schiff, Hardin & Waite never represented either Susquehanna or petitioner.

ply to any matters that are privileged as to petitioner: "*Privileged communications are expressly protected by subparagraph (g) of the agreement*" (Pet. A42, emphasis added). The court therefore rejected as "without merit" petitioner's generalized claim of *per se* injury from the discovery provisions (Pet. A41), concluded that the terms of the stipulation were fair and equitable to all parties including petitioner in his capacity as a Susquehanna shareholder, and dismissed the action against the nine settling defendants. Secondly, the court deferred to further proceedings before it, during continuation of the action against the remaining defendants, any objections petitioner might have (in his capacity as party-defendant) to implementation of the stipulation's discovery provisions (see Tr. 376-380 (April 2, 1974) ).[3]

6. The court of appeals unanimously affirmed the dismissal of the action against the settling defendants, accepting the district court's construction and analysis of the compromise stipulation. The Seventh Circuit approved the finding that the stipulation's discovery provisions are not applicable to privileged matters, and it ruled that subparagraph 5(g) (Pet. B2)—

> adequately protect[s] the [petitioner] against any prejudice which may arise by reason of the performance of the obligations of the settling defendants and their counsel . . . .

[3] Having concluded that rulings as to the privileged or non-privileged character of specific communications would be premature and irrelevant to the issue before him, Judge Tone heard no evidence and made no findings as to the existence or nature of any attorney-client relationships between and among petitioner, Susquehanna, Rhyne & Rhyne, and Schiff, Hardin & Waite. The court likewise heard no evidence and made no findings as to whether petitioner had transmitted any information, confidential to him alone, to those counsel, or as to whether, if he had done so in the circumstances of this action, he would have waived any attorney-client privilege.



The court concluded therefore that the agreement was not "invalid on its face" (Pet. B2).

Turning to implementation of the discovery provisions as this action continues against the remaining defendants, the appellate court approved the deferral of specific objections and the receipt of evidence until further proceedings in the district court, which it charged with responsibility for "administration of the provisions in question" (Pet. B3). The court held, in sum, that it could not "justify invalidation of a settlement, which is otherwise invulnerable, of a major aspect of this protracted litigation," on the basis of petitioner's generalized claims of prejudice—especially since petitioner's contentions "can best be resolved by the district court pursuant to an appropriate application" for particularized relief (Pet. B2).

## ARGUMENT

The petition presents no substantial issue warranting consideration by this Court. After full and careful inquiry, the district court decided that the stipulation of compromise and settlement was fair and equitable to all litigants and to Susquehanna's shareholders (including petitioner); it therefore dismissed the action against the nine settling defendants, specifically finding that the stipulation does not permit discovery of "[p]rivileged communications" between petitioner and his counsel (Pet. A42). The court of appeals reviewed that finding and approved it. Those decisions clearly are proper exercises of judicial discretion, and petitioner cites no cases holding that a settlement agreement cannot provide for amicable discovery of non-

privileged matters. Moreover, petitioner is not and cannot be prejudiced by the courts' approval of a compromise settlement to which he is not a party, for the decisions below assure his right to seek from the district court in later proceedings any protective relief he deems appropriate.

1. The courts below properly discharged their responsibility under Rule 23.1, Fed. R. Civ. P., to scrutinize the fairness of proposed settlements in shareholders' derivative actions. Their findings are not even contested by petitioner as erroneous, let alone "clearly erroneous" (Rule 52(a), Fed. R. Civ. P.), and their judgments predicated on those findings are in full accord with settled principles governing the approval of Rule 23.1 settlements. *E.g., United Founders Life Ins. Co.* v. *Consumers Natl. Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971); *Newman* v. *Stein*, 464 F.2d 689 (2nd Cir.), *cert. denied sub nom. Benson* v. *Newman*, 409 U.S. 1039 (1972); see *Protective Committee* v. *Anderson*, 390 U.S. 414, 424-425 (1968).

Petitioner's sole challenge in this Court to the judgments below is based on the assertion that, by approving the stipulation's amicable discovery provisions, the lower courts "required [Rhyne & Rhyne and Schiff, Hardin & Waite] to engage in a course of conduct which is forbidden by the ethical norms of the legal profession" (Pet. 14-15). That assertion misconstrues the decisions below and is unfounded in fact.

Both the district court and the court of appeals found that the amicable discovery provisions of the stipulation do not apply to privileged matters. And that finding of fact is unimpeachable. The stipulation specifically states that "*nothing* contained in [the discovery provisions] *shall require or expect* any counsel for the



Settling Defendants . . . to breach an attorney client obligation." Nor shall those counsel, as a result of the discovery provisions, "owe any duty or obligation to Plaintiffs or Susquehanna which are incident to attorney-client obligations." (*Supra,* pp. 4-5 (emphasis added).)

It is difficult to imagine a stronger factual underpinning for the lower courts' rulings that the compromise settlement, on its face, is valid and adequately protective of petitioner's interests (Pet. B2). Indeed, petitioner's interests not only are protected by the stipulation, they are clearly and unambiguously protected, demonstrating scrupulous deference to ethical considerations rather than the "appearance of impropriety" imagined by petitioner (see Pet. 7).[4] Thus, the words of the stipulation itself, and the courts' findings based on those words, safeguard petitioner's privileged communications while approving the right of the settling parties to share non-privileged information in preparation for trial. The judgments of the lower courts, in sum, are in every respect fair and equitable to Susquehanna's shareholders and to all the litigants including petitioner.

2. Petitioner has not been and cannot be prejudiced by dismissal of the action against the settling defendants. As the district court held in approving the underlying compromise stipulation, "[t]he parties to the agreement cannot by their agreement affect the rights of a non-party [petitioner] and they do not purport to

[4] The stipulation and the decisions below, in fact, are more protective of petitioner's interests than required by the ABA Code of Professional Responsibility. Disciplinary Rule DR4-101(C)(2) allows a lawyer to reveal confidences or secrets of his client when "required by law or court order" (Pet. E8).

do so'' (Pet. A42). Amplifying that holding, the court of appeals explicitly affirmed petitioner's right to apply to the district court for any protective orders he deems appropriate (Pet. B2).

This means that during the continuation of this action against the remaining defendants, petitioner may ask the district court for relief against disclosure of matters he considers confidential; the district court has been directed to hear his claim, review the relevant evidence, and decide the issue; in due course those decisions may be reviewed by an appellate court. Adherence to that time-honored manner of judicial decision and review cannot injure petitioner. Departure from it, however, would run counter to the public interest in settling lawsuits, the judicial policy against premature decisions in a factual vacuum, and the practical interests of the settling defendants, the plaintiffs, and Susquehanna. Respondents should not be required to litigate with each other for another decade, to remain unwilling adversaries, when they choose to compromise and settle and, in so doing, have been painstakingly careful to preserve the confidentiality of any privileged disclosures by petitioner to his counsel.

3. Finally, reversal of the judgment below would in no way expedite resolution of the question of Susquehanna's right to obtain the information covered by paragraph five of the stipulation from the settling defendants, Rhyne & Rhyne, and Schiff, Hardin & Waite. Petitioner chose his counsel, he chose Susquehanna's, and he made them the same. Rhyne & Rhyne, in dealing with Schiff, Hardin & Waite, represented two clients, petitioner and Susquehanna. Whatever the relationship between those firms and petitioner, Susquehanna stands in *pari materia*. See *Simpson* v. *Motor-*



*ists Mutual Ins. Co.*, 494 F.2d 850, 855 (7th Cir.), *cert. denied*, 419 U.S. 901 (1974); *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970), *cert. denied sub nom. Garner* v. *First American Life Ins. Co.*, 401 U.S. 974 (1971).

Petitioner alleges that both firms have had discussions with him about this action after Rhyne & Rhyne ceased representing him (Pet. 11-12). Susquehanna did not attempt to prevent those communications, but it surely is entitled to equal discovery, so long as any legitimate confidences of petitioner are protected, as the courts below have assured they will be.[5] And petitioner of course has no right to prevent what the decisions below allow, the discovery of non-privileged, but perhaps important evidence by the persons whom he allegedly defrauded.[6]

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[5] Petitioner, fervid in imagining infringements of his ''rights'' and zealous about even the ''appearance'' of impropriety by others, nowhere details in the petition any steps he took to insure preservation of Susquehanna's attorney-client privilege during the period of joint representation by Rhyne & Rhyne and in the course of his post-representation communications with both firms. We assume no impropriety in Mr. Korholz' conduct or that of his counsel. Likewise, as Judge Tone observed, the courts ''cannot assume that the Settling Defendants or their counsel will invade Korholz' attorney-client privilege'' in implementing the discovery provisions of the stipulation of compromise and settlement (Pet. A42).

[6] Each case relied upon by petitioner (Pet. 16-26) held, in its peculiar circumstances, that an attorney could not divulge the confidences of his client. None held that an attorney could not divulge non-privileged communications. Futhermore, in each case counsel initially retained by one side later sought to participate actively on the adverse side, either as counsel or as a party. Here, by way of contrast, counsel's role in implementing the stipulation's discovery provisions is to be completely neutral, and in that role they undertake no obligations as counsel to Susquehanna (see *supra*, p. 5).

Notices of formal discovery by Susquehanna would raise issues identical to those the courts below preserved petitioner's right to raise. But it would do so in a considerably more complicated case, a case having twelve defendants instead of three, and a case where the counsel involved would still be representing nine of those defendants. The procedure outlined by the court of appeals—"an appropriate application" to the district court by petitioner after the settling defendants are dismissed—is the best vehicle for fairly resolving any issue about petitioner's rights in his allegedly privileged communications and Susquehanna's parallel rights.

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Petitioner asks this Court to protect rights the stipulation already protects, to hold what the courts below already have held—that his "[p]rivileged communications" cannot be discovered from his counsel (Pet. A42). He requests, in essence, that this Court vacate the lower courts' judgments so as to affirm the lower courts' rulings protecting the attorney-client privilege —all to the detriment of the settling defendants, the plaintiffs, Susquehanna, and the orderly administration of justice, and all to no legitimate benefit of petitioner.

Petitioner's efforts to upset the settlement of "a major aspect of this protracted litigation" (Pet. B2) should be rejected. Petitioner should be remanded to his remedies in the district court at this time, as he must be ultimately, and this action should proceed in accordance with the rulings below.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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